

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT J. SANDERS
Claimant

VS.

T. ROY CONSTRUCTION
Respondent

AND

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

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Docket No. 1,004,382

ORDER

Respondent requests review of the September 7, 2004 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) concluded claimant was entitled to the medical treatment and temporary total disability benefits at the rate of \$268.68 dating back to September 22, 2003¹ and continuing “until [c]laimant has been released to return to work, and has been offered accommodated work within temporary work restrictions, or has attained maximum medical improvement.”²

The respondent requests review of this decision alleging the ALJ exceeded his jurisdiction in awarding temporary total disability benefits. Respondent maintains claimant has been diagnosed with a traumatic hernia and under K.S.A. 44-510d(a)(22), is entitled to nothing more than medical treatment. Alternatively, respondent suggests that, at most, 12 weeks of temporary total disability benefits would be due for claimant’s inoperable hernia.

¹ This date represents the date the ALJ used to begin claimant’s temporary total benefits.

² ALJ Order (Sept. 7, 2004).

Claimant argues the Board has no jurisdiction to hear this appeal as the issue to be decided stems from a decision to grant temporary total disability benefits. Assuming the Board does have jurisdiction, claimant contends the ALJ has the authority, under K.S.A. 44-510d(a)(22), to grant weekly monetary benefits for that period an employee is actually unable to work until such time as the hernia can be surgically repaired.

The only issue to be determined is whether the ALJ exceeded his jurisdiction in granting claimant's request for temporary total disability benefits dating back to September 22, 2003 for his work-related hernia.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be affirmed.

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 44-551.

In this instance claimant alleges there is no jurisdiction as the pending issue involves an award for temporary total disability. However, the Board finds the entirety of respondent's argument, specifically that the ALJ exceeded his jurisdiction in awarding an amount of temporary total disability benefits in excess of that provided for by statute gives rise to jurisdiction. This is because resolution of the jurisdictional issue is dependent upon resolution of the substantive issue of whether more than 12 weeks of temporary total disability benefits can be awarded for a hernia claim.

K.S.A. 44-510d(a)(22) defines the benefits which may be awarded for a hernia:

For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during 12 weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for surgical repair of such hernia shall deprive such employee of any benefits under the workers compensation act.

Respondent argues this statute only authorizes the ALJ to award a maximum of 12 weeks of temporary total disability and only then, when the injured employee's hernia is inoperable. The Board rejects this argument.

The clear intent of the statute is to compensate an injured employee who has suffered a traumatic hernia only for that period of time the employee is "actually unable" to work due to the injury. When the hernia is inoperable, weekly payments are available for a period of 12 weeks only. Conversely, in the event the hernia is operable, but the employee unreasonably refuses to undergo surgery, no benefits are available. Obviously this statutory scheme caps the employee's recovery and limits his ability to manipulate the system.

Nonetheless, the statute plainly provides for the payment of temporary total disability benefits for that "period of time as such employee is actually unable to work on account of such hernia."³ Here, claimant's diagnosis was delayed due to a difference of opinion amongst the physicians who have evaluated claimant as to the source of his ongoing groin and testicular problems. Moreover, there were additional symptoms that required an evaluation by a urologist. Claimant has not been able to work since March 13, 2002, the date of the accident. Although Mr. Roy, respondent's owner, testified that he believed claimant had told him he had a job as a heavy equipment operator since leaving respondent's employ, that testimony was not without some uncertainty. The ALJ was apparently not persuaded that claimant had worked since March 13, 2002 and as such, he ordered the payment of temporary total disability benefits. The Board agrees with the ALJ's conclusion and affirms his preliminary hearing Order.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated September 7, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-510d(a)(22).